FILED
MAR 20 1970
JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

October Term, 1969

No. 1340

HERMAN GORDON,

Petitioner,

vs.

UNITED STATES OF AMERICA

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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MIAMI REVIEW — 371-4853 — 377-3721

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OPINIONS OF THE COURTS BELOW

The Opinion of the trial judge in the United States District Court for the Southern District of Florida denying a Motion to Suppress Evidence was entered on January 15, 1969, and is unreported. A copy is attached as APPENDIX "A".

The Opinion and Judgment of the United States Court of Appeals for the Fifth Circuit, entered on January 26, 1970, is unreported. A copy is attached as APPENDIX "B".

The Order of the same Court denying a Petition for Rehearing was entered on February 18, 1970. A copy is attached as APPENDIX "C".

The Order of the same Court staying an Order of the District Court revoking the appeal bond of Petitioner was entered on February 19, 1970. A copy is attached as APPENDIX "D".

JURISDICTION

The jurisdiction of this Court is invoked under the provisions of 28 U.S.C., §1254 (1).

QUESTIONS PRESENTED

I

WHERE A SEARCH WARRANT AUTHORIZES SEARCH FOR, AND SEIZURE OF, 187 PIECES OF JEWELRY, EACH PIECE MARKED WITH "18K" OR "22K", PLUS TRADEMARK "Z" OR "ZOLOTAS", IS ITS EXECUTION LEGAL WHEN FIVE F.B.I. AGENTS SEARCH A 2-BEDROOM APARTMENT FOR APPROXIMATELY 7 HOURS INITIALLY, AND SEIZE TWO CUPS WHICH CONTAIN NO MARKINGS, AND ALSO SEIZE THOUSANDS OF OTHER ITEMS NOT IN PLAIN VIEW AS CONTAINED IN A 108-PAGE INVENTORY CONSISTING OF JEWELRY, COINS, WATCHES, WATCH MOVEMENTS, SEMI-PRECIOUS AND PRECIOUS STONES, NOT DESCRIBED IN THE WARRANT BUT WHICH THEY CONTEND TO BE CONTRABAND BECAUSE IT MIGHT POSSIBLY BE STOLEN MERCHANDISE ALTHOUGH THEY DO NOT HAVE ANY KNOWLEDGE AS TO WHEN OR WHERE IT MIGHT HAVE BEEN STOLEN OR TRANSPORTED IN INTERSTATE COMMERCE, AND WHEN A TOTAL OF EIGHT F.B.I. AGENTS CONTINUE THE SEARCH FOR AN ADDITIONAL FOUR HOURS AND MAKE A RETURN AND INVENTORY ON THE SEARCH WARRANT MERELY FOR TWO CUPS?

II

ON A CHARGE OF POSSESSION OF WATCH MOVEMENTS ON MARCH 18, 1968, WHICH WERE PART OF A SHIPMENT STOLEN FROM O'HARE INTERNATIONAL AIRPORT, CHICAGO, ILLINOIS, ON AUGUST 20, 1966, WHILE MOVING IN FOREIGN COMMERCE, IN VIOLATION OF TITLE 18, U.S.C. §659, DOES THE GOVERNMENT PRESENT A PRIMA FACIE CASE WHEN THERE IS NO DIRECT EVIDENCE THAT DEFENDANT KNEW THE MOVEMENTS WERE STOLEN, AND WHEN THE THEFT TOOK PLACE SOME ONE YEAR AND SEVEN MONTHS PRIOR TO THE POSSESSION?

III

WHERE AN APPELLATE COURT REVERSES A COUNT OF AN INDICTMENT ON WHICH THERE WAS A CONCURRENT SENTENCE, DOES THE CONCURRENT SENTENCE DOCTRINE HAVE CONTINUING VALIDITY?

IV

IS IT IRRATIONAL OR ARBITRARY AND, HENCE UNCONSTITUTIONAL FOR A TRIAL COURT TO INSTRUCT A JURY THAT MERE POSSESSION OF PROPERTY RECENTLY STOLEN IS A CIRCUMSTANCE FROM WHICH A JURY MAY REASONABLY DRAW

THE INFERENCE AND FIND THAT THE PERSONS IN POSSESSION KNEW THE PROPERTY HAD BEEN STOLEN AND THAT THE GOVERNMENT NEED NOT ESTABLISH THAT THE ACCUSED ACTUALLY KNEW THAT THE PROPERTY WAS A PART OF INTERSTATE COMMERCE?

CONSTITUTIONAL PROVISIONS AND FEDERAL RULE INVOLVED

The constitutional provision involved in this Petition is the United States Constitutional Amendment No. 4, as follows:

> "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Federal Rule involved in this Petition is Rule 41 (d) of the Federal Rules of Criminal Procedure, 18 U.S.C., Rule 41, restricted to the following portions thereof:

> "*Execution and Return with Inventory.* The officer taking property under the warrant shall give to the person from whom or from whose premises the property was taken a receipt for the property taken or shall leave the copy and receipt at the place from which the property was taken. The return shall be made promptly and

shall be accompanied by a written inventory of any property taken. The inventory shall be made in the presence of the applicant for the warrant and the person from whose possession or premises the property was taken, if they are present, or in the presence of at least one credible person other than the applicant for the warrant or the person from whose possession or premises the property was taken, and shall be verified by the officer."

STATEMENT OF THE CASE

On March 27, 1968, Petitioner was indicted for the possession of 24 pieces of 18-carat and 22-carat gold jewelry and decorative cups of blue enamel (Greek jewelry), which were part of a shipment of 187 pieces of jewelry which had been stolen from the John F. Kennedy Airport in New York between January 12, 1968, and January 15, 1968, while moving in foreign commerce, in violation of Title 18, U.S.C. §659 (A. 6-7).

On August 7, 1968, a superseding Indictment charged Petitioner in four (4) counts (A. 8-11). Count 1 remained as above. Count II charged Petitioner with possession of 345 Waltham Watch Company movements which were part of a shipment stolen from O'Hare International Airport, Chicago, Illinois, on August 20, 1966, while moving in foreign commerce, in violation of Title 18, U.S.C. §659. Count III charged Petitioner with receiving stolen jewelry which was part of an interstate shipment from Garden City, New York, to North Bay Village, Florida, in violation of Title 18, U.S.C. §2315. Count IV charged Petitioner with receiving stolen diamond rings which were part

of an interstate shipment from Athens, Georgia, to North Bay Village, Florida, in violation of Title 18, U.S.C. §2315.

Petitioner pleaded not guilty and a pre-trial motion to suppress the evidence (A. 15-33) was denied after the taking of testimony (A. 517-521).

On the first day of trial, the Government dismissed Count I of the Indictment (A. 11-12). A jury found Petitioner guilty on Counts II, III and IV, and the Court adjudged him guilty and sentenced him to imprisonment for a period of ten (10) years on each Count, to run concurrently (A. 533-535).

The salient facts are that in about June, 1967, the F.B.I. assigned Petitioner to Special Agent Yablonsky (A. 323), as a "top jewel thief" (A. 324), and this Agent proceeded to get acquainted with Petitioner (A. 325), to gain his confidence and determine whether or not he was engaged in criminal activities (A. 333).

After Yablonsky arranged several meetings with Petitioner, in an attempt to establish a rapport (A. 294), over the period of a year, another Special agent supplied Yablonsky with a flight manifest to the Dominican Republic, on which Petitioner's name appeared (A. 296). Yablonsky seized upon this further opportunity to talk with Petitioner and enter his 2-bedroom apartment (A. 330, 341). Although a visit to the Dominican Republic is no violation of the law (A. 302, 341), on March 14, 1968, Yablonsky telephoned Petitioner from the lobby of the latter's apartment house, and requested an audience (A. 179, 298). Petitioner, his wife and a visitor testified that Yablonsky told him on the telepehone that he had a paper which

could lead to Petitioner's arrest if it was not explained (A. 127, 161-2, 180, 183, 238). Solely in an effort to avoid arrest or embarrassment, Petitioner admitted Yablonsky to his apartment (A. 141, 150-1, 230, 238, 241-2). The conversation concerning the innocuous trip consumed 5 to 15 minutes (A. 119, 196, 200, 249), but Yablonsky remained an additional two (2) hours recounting his exploits (A. 200, 232, 252, 254, 301). During the conversation, Yablonsky scrutinized the apartment (A. 327), and observed a "*purple*" cup on an end table and another in a breakfront (A. 304, 306). He immediately returned to his office to examine photographs of items allegedly recently stolen from John F. Kennedy Airport in New York (A. 307). He thereupon prepared an Affidavit for a Search Warrant in which he described a shipment of 187 pieces of "Greek jewelry" stolen from the airport aforesaid, each piece being "marked with either 18K or 22K plus trademark 'Z' or 'Zolotas'" (A. 1-3). He recounted the interview with Petitioner and his observation of two (2) small cups "which appeared to be *purple* in color", and based upon a review of photographs, he stated that he "believed" the cups to be identical to the "stolen" cups. (All relating to Count I of the Indictment).

Based only upon this Affidavit, the U. S. Commissioner issued a Search Warrant for 187 pieces of jewelry, particularly describing each piece as "marked with either 18K or 22K plus trademark 'Z' or 'Zolotas'" (A. 3-5). (A copy of the Search Warrant and Return is attached as APPENDIX "E".)

Although the photographs were in black and white (A. 388), the Inventory and manifest of the stolen jewelry which accompanied the photographs described the cups

to be "*blue*" (A. 345), and encrusted with sapphires, emeralds and rubies (A. 347, 388). Actually, the cups in Petitioner's apartment contained diamonds (A. 348, 388), and the description of the stolen cups in the possession of the F.B.I. does not mention diamonds (A. 347). This underlying information was not contained in Yablonsky's Affidavit, nor is there any record that it was supplied to the U. S. Commissioner in any other manner.

On March 18, 1968, (4 days later) (A. 98, 233, 310, 376), at about 12:13 p.m. (A. 378), Yablonsky and four additional F.B.I. agents executed the Search Warrant on Petitioner's wife at his home during his absence (A. 98, 111, 142, 204, 235, 310-11, 378).

Prior to the Petitioner's return to his apartment, the agents commenced a search of the entire premises (A. 98, 112, 114-15, 116, 312-13), and Special Agent Ackerley seized the two cups immediately (A. 222, 273, 351, 386), examined them in detail (A. 379, 387), and compared them with the photographs and Inventory in his possession (A. 380, 387). He did not find any markings on the cups, nor any description of cups encrusted with diamonds (A. 143, 222, 237, 387-388). *The Government does not dispute that the 2 cups did not bear the markings as recited in the Affidavit and Search Warrant* (A. 237, 404), and that this fact was brought to the attention of the law-enforcement officers at the time of their seizure. (A. 405).

Nevertheless, the five agents spread out in the apartment, took photographs (A. 113, 234, 265), and opened kitchen drawers and cupboards, bureau and table drawers, breakfront and all closets (A. 98, 100, 108-9, 112, 115-16,

222, 234, 264-5, 271-2, 367). The search continued actively until approximately 3:00 p.m. (A. 276, 433), during the course of which, jewelry, coins, watches and assorted precious and semi-precious stones not described in the Search Warrant were removed from their containers, examined and seized as contraband (A. 99, 122, 143, 145, 222, 224, 226, 235, 273, 279, 390-1, 397). On several occasions during the course of this search, and *at the completion of the search, Special Agent Ackerley, in response to numerous questions to him of what he had found that was particularly described in the Search Warrant, answered, "Nothing" or "the 2 cups"* (A. 146-7, 209, 226 274-5, 394, 431, 443).

At the time the so-called contraband was seized, [comprising thousands of items listed in 108 pages of Inventory (A. 412)], the agents had no knowledge of when or from where any of it had been stolen (A. 354, 359, 362, 364-5, 383, 436-7), nor whether or not it had been transported in interstate commerce (A. 365, 440), or even if it had, in fact, been stolen. (A. 438).

Ackerly, who was in charge of the search, and the other agents were in doubt as to the authority of the Search Warrant to seize the vast quantity of items (A. 383, 398, 434), and after many dozens of telephone calls (A. 145, 236, 264, 268, 276, 279, 397), Ackerly and Yablonsky suggested that a second Search Warrant be issued (A. 384, 392). At about 3:00 p.m., Yablonsky left the premises for that purpose, while the four other agents remained in the apartment (A. 276, 433). At about 8:00 p.m. (A. 226, 273), Yablonsky returned with a second Search Warrant, accompanied by 3 additional F.B.I. agents (A. 276-7, 320). The eight law-enforcement officers then proceeded to make a second search and prepare a partial

Inventory (A. 278), during the course of which, 22 pieces of allegedly stolen "Greek jewelry" (applicable to Count I) were claimed to have been found *for the first time in a closet previously searched and examined.* (A. 366, 400-1).

At about 10:30 p.m. (A. 278), the required return was made on the first Warrant describing only the following inventory:

"One gold cup, blue enamel, green interior."
"One gold cup, blue enamel, gold interior."
(A. 5-6)

At about 11:30 p.m. (A. 278), a return was made on the second Warrant containing 16 pages of inventory, including 9 sealed suitcases of items which were not particularly inventoried until some weeks later (A. 45-75, 278).

Defendant was not placed under arrest at any time during the search and seizure (A. 144, 223, 227, 279, 368).

The trial court denied a Motion to Suppress the Evidence upon the ground that the Defendant was not subjected to an unreasonable search and seizure (APPENDIX A) and *held that the second Warrant cannot be considered on the question of legality of the seizure.*

Over objection by Petitioner (A. 451), the trial court charged the jury that possession of property recently stolen, if not satisfactorily explained, is a circumstance from which the jury may draw the inference and find that the person in possession knew that the property had been stolen (APPENDIX F). Counsel for the Government also

argued the language of such charge in final argument to the jury on three occasions (A. 463, 465, 492).

On appeal to the United States Circuit Court of Appeals for the Fifth Circuit, the conviction on Count IV was reversed, and Counts II and III (and, inadvertently, Count I) were affirmed. A Petition for Rehearing was denied.

ARGUMENT FOR ALLOWANCE OF WRIT

I

Petitioner contends that this Petition should be granted for the reason that the Court of Appeals has rendered a decision and decided a Federal question in a way in conflict with *Marron v. United States*, 275 U.S. 192 (1927), which was decided by this Court.

The trial court herein found as a fact that the property of Petitioner, portions of which were introduced into evidence at his trial, was seized by law-enforcement officers on the authority of the first search warrant, and many hours before the second warrant issued. Yet, the inventory and return on the warrant, as required by Rule 41 (d) of said Rules of Criminal Procedure, contained nothing more than a description of two cups.

The Fourth Amendment to the United States Constitution prohibits unreasonable searches and seizures. This court, in the landmark case of *Marron v. United States, supra*, held it to be unreasonable to seize one thing under a warrant describing another, in the following language:

"The requirement that warrants shall particularly describe the things to be seized makes general searches under them impossible and *prevents the seizure of one thing under a warrant describing another.* As to what is to be taken, *nothing is left to the discretion of the officer executing the warrant.*

"And the Congress in enacting the laws governing the issue and execution of this search warrant was diligent to *limit seizures to things particularly described.*" (authorities omitted) (emphasis supplied)

Subsequently, this Court forged a narrow exception to the *Marron* ruling in *Harris v. United States*, 331 U.S. 145 (1947), and again in *United States v. Rabinowitz*, 339 U.S. 56 (1950). However, Petitioner submits that the impact of *Chimel v. California*, 395 U.S. 752 (1969) upon police search and seizure practices, is not limited to warrantless searches. Nor is it material whether or not *Chimel* is to be applied retroactively insofar as it overruled *Harris v. United States, supra*, and *United States v. Rabinowitz, supra.* (The case at bar was pending on direct appeal to the Court of Appeals at the time Chimel was decided). It is plain that law-enforcement officers executing a search warrant may not seize items not specified or particularly described in the warrant. They may not seize unmarked jewelry, coins, watches, watch movements and precious stones under a search warrant particularly describing a certain marked type of "Greek jewelry".

The trial court upheld the validity of the seizure on the sole authority of *Gurleski v. United States*, ——F.2d

——, 5 Cir. (1968), which, in turn, relied completely upon the exception to the *Marron* case, as enunciated by the now-overruled *Harris v. United States*, *supra*. Accordingly, *Gurleski v. United States* cannot authorize the seizure in question, and the Court of Appeals cited no other authority therefor.

> "[T]he scope of [a] search must be 'strictly tied to and justified by' the circumstances which rendered its initiation permissible." *Terry v. Ohio*, 392 U.S. 1 (1968)

As stated by this Court in *Stanley v. Georgia*, 89 S.Ct. 1243 (1969):

> "There can be no doubt, therefore, that the agents were lawfully present in the appellant's house, *lawfully authorized to search for any and all of the items specified in the warrant*, and lawfully empowered to seize any such items they might find. It follows, therefore, that the agents were acting within the authority of the warrant when they proceeded to the appellant's upstairs bedroom and pulled open the drawers of his desk. *But when they found in one of those drawers not gambling material but moving picture films, the warrant gave them no authority to seize the films.*
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> * * *
>
> "This is not a case where agents in the course of a lawful search came upon contraband, criminal activity, or criminal evidence *in plain view.* ** And this is not a case that presents any questions as to the permissible scope of a search made

incident to a lawful arrest. For the *appellant had not been arrested* when the agents found the films. ***

"* * * *To condone what happened here, is to invite a government official to use a seemingly precise and legal warrant only as a ticket to get into a man's home, and, once inside, to launch forth upon unconfined searches and indiscriminate seizures as if armed with all the unbridled and illegal power of a general warrant.*" (Emphasis supplied)

II

The Court of Appeals for the Fifth Circuit rendered its decision on this question, which is in conflict with the decisions of other courts of appeals on the same matter. The Fifth Circuit Court held in its Opinion that the term, "recently stolen" is a relative term, and that property which was stolen some one year and seven months prior to the possession thereof raised facts sufficient to submit to a jury concerning whether or not such property was "recently stolen", so as to raise the inference of knowledge of the character of the property.

In *Van Gorder v. United States*, 21 F.2d 939 (8th Cir.) (1927), it was stated by the Court:

"Eighty seven days after the alleged theft was not so recent a possession under the facts and circumstances of this case as to sustain a finding of either guilty knowledge of the defendant that the keys were stolen property or of the fact that he was the thief."

See also *Gargotta v. United States*, 77 F.2d 977 (8th Cir.) (1935), wherein the Court said:

> "There is no evidence to show, or tending to show, either direct or circumstantial, when, where, or the circumstances under which the defendant acquired or came into possession of the property, nor the length of time they were in his possession. There is no evidence, either direct or circumstantial, showing any fabrication, suppression, or spoliation of evidence by the defendant. ***
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> * * *
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> "It should be readily conceded that the mere possession alone of the pistols 293 days after the larceny would not in itself raise the legal presumption that the defendant stole them. *Mere possession alone, after such a lapse of time, cannot in any sense be considered so recent a possession as to sustain a finding of guilty knowledge that the property was stolen.*" (emphasis supplied)

Time limits within which an inference of guilty knowledge would be justified were described in *Aron v. United States*, 382 F.2d 965, (8th Cir.) (1967):

> "**** There are cases running from three months to eleven months where the doctrine of possession of recently stolen property was applied, (Footnote 2 at page 475 of 363 F.2d); and, no doubt, there are cases imposing *shorter* periods."

However, the cases do not seem to apply the inference when, as in the case at bar, the theft took place some 19

months before possession. Had this charge been tried alone, as Defendant contends it should have been, the jury could not have cumulated other evidence, and, very likely, would not have found one year and seven months to be recent possession, even if the Court did not dismiss the charge as a matter of law.

III

The validity of the concurrent sentence rule was not passed upon by this Court in *Benton v. Maryland*, 395 U.S. 784 (1969), but the universal confusion in the application of the rule was noted by the Court in the following language:

> "The concurrent sentence doctrine has been widely, if somewhat haphazardly, applied in this Court's decisions. At times the Court has seemed to say that the doctrine raises a jurisdictional bar to the consideration of counts under concurrent sentences. Some opinions have boldly declared that judgments of conviction 'must be upheld' if any one count was good. Barenblatt v. United States, 360 U.S. 109, 115, 79 S.Ct. 1081, 1087, 3 L.Ed.2d 1115 (1959); see United States v. Gainey, 380 U.S. 63, 65, 85 S.Ct. 754, 756, 13 L.Ed.2d 658 (1965). In other cases the Court has chosen somewhat weaker language, indicating only that a judgment 'may be affirmed if the conviction on either count is valid.' Roviaro v. United States, 353 U.S. 53, 59, n. 6, 77 S.Ct. 623, 627, 1 L.Ed.2d 639 (1957). And on at least one occasion, the Court has ignored the rule entirely and decided an issue that affected only one count,

even though there were concurrent sentences. Putnam v. United States, 162 U.S. 687, 16 S.Ct. 923, 40 L.Ed. 1118 (1896).

"One can search through these cases, and related ones, without finding any satisfactory explanation for the concurrent sentence doctrine. See United States v. Hines, 256 F.2d 561, 562-563 (C.A. 2d Cir. 1958). * * *."

The question arises in the case at bar because Petitioner was sentenced by the trial Court to ten (10) years on each of three (3) counts, to be served concurrently. The Court of Appeals reversed on one of the counts, but, thereafter, denied rehearing although the three counts in the Indictment charged Petitioner with possessing goods stolen in Chicago on August 20, 1966, in Count II; with possessing goods stolen in New York on December 2, 1967, in Count III; and with possessing goods stolen in Atlanta on March 4, 1968, in Count IV.

Petitioner submits that the effect to be given *Benton v. Maryland*, supra, must be changed from one providing that in the case of concurrent sentences, the questioned conviction on one count will not be considered unless it can be shown that Defendant would be prejudiced if the conviction was unjustified, to one providing that prejudice will be presumed unless it is clearly shown that, in fact, no prejudice would result. See *United States, ex rel Weems v. Follette*, 414 F.2d 417 (2d Cir.).

The jury herein may well have been influenced with respect to Count II and III by "spillover" of the evidence as to Count IV. The courts are quick to reverse a convic-

tion on the ground of prejudice where evidence of Defendant's commission of other crimes has been introduced. To be consistent Petitioner submits that this Court should hold that the introduction of wholly insufficient evidence of other crimes in the present case unfairly prejudiced Petitioner.

IV

This question raises the effect of *Leary v. United States*, 395 U.S. 6 (1969), and *Turner v. United States*, 90 S.Ct. 642 (1970), upon a charge to the jury by the lower court, and sustained by the Court of Appeals, that the possession by Petitioner of "recently stolen" jewelry permitted an inference of knowledge on the part of Petitioner that the jewelry was stolen.

At the trial in the case at bar, the Government offered no proof that Petitioner had knowledge of the character of the jewelry in his possession, nor that he had specific knowledge of who had stolen it, nor when, where or how it had been stolen. Yet, knowledge is an element of the offenses for which Petitioner was tried.

There is no legal difference in charging a jury as to a presumption and a permissible inference of guilty knowledge from unexplained possession. As stated by this Court, in *Turner v. United States, supra:*

> "Leary v. United States, supra, dealt with a statute, 21 U.S.C. §176a, providing that possession of marihuana, unless explained to the jury's satisfaction, 'shall be deemed sufficient evidence to authorize connection' for smuggling, receiving,

> concealing, buying, selling, or facilitating the transportation, concealment or sale of the drug, knowing that it had been illegally imported. Referring to prior cases holding that a statute authorizing *the inference of one fact from the proof of another* in criminal cases must be subjected to scrutiny by the courts to prevent 'conviction upon insufficient proof,' 395 U.S., at 37, 89 S.Ct., at 1549, the Court read those cases as requiring the invalidation of the statutorily authorized inference 'unless it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend.' 395 U.S., at 36, 89 S.Ct., at 1548. * * *
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> * * *
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> "Whatever course the jury took, it found Turner guilty beyond a reasonable doubt and the question on review is the sufficiency of the evidence, or more precisely, *the soundness of inferring guilt from proof of possession alone.* * * *" (emphasis supplied)

In both the *Leary* and *Turner* cases, this Court held that inferences in place of proof will not be permitted in any instance where there is any reasonable possibility that possession may be innocent or lawful, even in the case of so dangerous a drug as cocaine.

Clearly, there are many ways that stolen jewelry can be innocently or legally possessed. Such fact of possession alone should not authorize a jury to substitute inference for evidence: in at least one element of the offense proscribed by Section 659, viz., the Petitioner's knowledge that

the property was stolen; and in at least three elements necessary for prosecution under Section 3215, viz., 1) that the Petitioner had received the property; 2) that the property was moving as interstate commerce; and 3) that Petitioner knew that the property was stolen.

CONCLUSION

For the foregoing reasons, it is submitted that this Petition for Writ of Certiorari should be granted.

Dated at Miami Beach, Florida, this 19th day of March, 1970.

Respectfully submitted,

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APPENDIX "A"

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

NO. 68-355-Cr.-CA

UNITED STATES OF AMERICA,

Plaintiff,

-vs-

HERMAN GORDON, a/k/a "HY" GORDON,

Defendant.

(Filed January 15, 1969)

(R-1379)

ORDER DENYING MOTION TO SUPPRESS

THIS CAUSE came on before the Court pursuant to the motion to suppress presented by the defendant, Herman Gordon. The Court has heard the testimony of witnesses, considered the argument of counsel, and considered the memoranda of law filed by counsel in support of their respective positions. All testimony, memoranda of law, and argument of counsel previously presented to the court at the first hearing on the motion to suppress have been reviewed by the court. The Court concludes that the defendant, Herman Gordon, was not subjected to an unreasonable search and seizure. The motion to suppress is therefore denied.

In issue is the legality of a search conducted on March 18, 1968 by Federal agents. The search was of the apartment leased by the defendant. The Court has previously concluded that the agents gained admission to the premises pursuant to a valid search warrant. Deceit, fraud, or trickery were not utilized by the investigating agents in gaining admission to the premises. The warrant under which admission was gained described a box containing 187 pieces of Greek jewelry and two Greek cups. The warrant described the property with sufficient particularity—it cannot be successfully assailed on this ground. The defendant does assert however that the agents conducting the search seized property that was not described in the warrant. It is the defendant's position that officers conducting a search pursuant to a warrant may not seize property that is not described in the warrant, not even if the officers observe the property during the course of conducting the search and they reasonably believe that the property observed offends the law.

These salient facts appear from the record. The agents arrived at the defendant's apartment at 12:13 p.m. He was believed to be a "fence" and he was known to associate with underworld personalities. The agents commenced the search at approximately 12:45 p.m. Mrs. Gordon had requested the agents to wait until her husband returned home before conducting the search. The agents waited a reasonable period of time and then proceeded. The initial search continued until approximately 3:00 p.m. at which time Agent Yablonsky left the apartment for the stated purpose of getting cartons for packing. Prior to his leaving, the agents seized two Greek cups and inspected the contents of a closet. The two Greek cups seized were quite similar in appearance to the Greek cups described in the

warrant. They did not, however, bear the marking of "18 karat" or "22 karat" or the letter "Z" as mentioned in the warrant. The search of the closet uncovered ten suitcases and attache cases. These were searched and found to contain Waltham watch parts, numerous coins, settings, stones, and pieces of Greek jewelry. The latter matched the description of the jewelry mentioned in the indictment. Agent Yablonsky returned at 7:15 p.m. with cartons and a second warrant. This new warrant described with particularity the property discovered in the closet. It is clear that during his absence the defendant was not at liberty to remove the subject property from the apartment. Further, there was credible testimony that the closet was locked with a key after it was searched (R-1381) and the key was retained by one of the agents. The Court must conclude that the property in question was "seized" by the agents prior to the return of Agent Yablonsky. The legality of the seizure must therefore be tested by conduct anticedent to the seizure and not by subsequent conduct. The second warrant accordingly cannot be considered on the question of the legality of the seizure. In the same respect, the conduct of Agent Yablonsky in securing a second warrant cannot invalidate a prior valid seizure. The Court does not view his conduct as an attempt to "cover his tracks" but rather as an attempt to fortify the search and "seizure" with all valid remedies available to law enforcement. Approximately twelve hours passed from the time the agents first entered the premises until they left. The significant amount of this time was spent in preparing the property for carting away and not in furtherance of a search. At no time was the defendant placed under arrest.

The Court does not agree that property may not be seized during the course of a search conducted pursuant to a warrant which property is not described in the warrant. This very question was answered favorably for the government by the Fifth Circuit Court of Appeals in *Gurleski v. United States*, ____F.2d____, No. 25338 (November 27, 1968).

The Court concludes that the search and seizure was reasonable under all the circumstances involved in this case. A general exploratory search for evidence which is condemned in *United States v. Lefkowitz*, 285 U.S. 452 (1932), was not conducted in the case sub judice.

The Court ORDERS AND ADJUDGES that the motion to suppress presented by the defendant, Herman Gordon, be and the same is hereby denied. (R-1382)

The trial of this cause shall commence at 9:30 a.m. in Courtroom 314 on the 16th day of January, 1969.

DONE AND ORDERED at Miami, Florida, this 14th day of January, 1969.

/s/ C. CLYDE ATKINS

United States District Judge

APPENDIX "B"

In The
UNITED STATES COURT OF APPEALS
For The Fifth Circuit

No. 27455

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
versus
HERMAN GORDON,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Florida

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(January 26, 1970)

Before BROWN, Chief Judge, TUTTLE and MORGAN Circuit Judges.

TUTTLE, Circuit Judge: This appeal deals primarily with the validity of a search of the apartment of the appellant which produced evidence in the nature of a large quantity of jewelry, which subsequently formed the basis of appellant's conviction under Title 18 U.S.C.A. §659 and §2315 being in possession and receiving stolen jewelry while moving in foreign or interstate commerce.

The most important issue arises from the contention made by the appellant that the search warrant which permitted access by the federal agents to Gordon's apartment was obtained following a viewing of suspected stolen property in the apartment after a federal agent, Yablonsky, obtained admission by a ruse. Appellant contends that, although he knew Yablonsky and knew that he was an FBI agent, he had not been too anxious to see him and that Yablonsky phoned him from downstairs and asked to see him, but that when appellant said that he had nothing to see him about, Yablonsky mentioned the possibility of a criminal prosecution, which might be resolved if he could be permitted to talk to Gordon. Appellant's statement of the case is that thereupon he consented to talk to Yablonsky, who then came to the apartment and sat around and talked for two hours, during which time he observed two unusual type metal cups, the presence of which subsequently led to the obtaining of a search warrant by Yablonsky.

Yablonsky's testimony, to the contrary, was that no ruse was employed by him. His story was that he was a member of the jewel theft squad of the Miami office, and was concerned with the activities of the defendant with reference to the possibility of defendant furnishing him information pertaining to jewel thefts. During the first week of March, 1968, two flight manifests were shown to Yablonsky and he was asked if the name Herman Gordon, which appeared on the manifest, was the same Herman Gordon that he knew. Not being certain as to whether they were one and the same, on March 14, 1968, he visited Herman Gordon at his apartment to ascertain the facts as to this matter. His testimony was that upon arriving in the

lobby of the defendant's apartment, he telephoned and asked if he might come up and speak with him. He states that Gordon invited him up to his apartment and admitted him. Yablonsky then established the fact that the same Herman Gordon is the person whose name appeared on the manifest. Thereafter he remained in the apartment for approximately two hours, engaged in conversation as to his exploits of the past. He then departed about 12:30 P.M.

Since this matter was critical to the judgment of the trial court as to the validity of the search warrants, we stop at this point to state that much evidence is introduced dealing with this matter. However, appellant incorrectly states the record when, in his brief, he says that "defendant, his wife and a visitor testified that Yablonsky told him on the telephone that he had a paper which could lead to defendant's arrest if it was not explained," citing the Appendix 127, 161-2, 180, 183, 238. We have carefully read these references to the record and find only Gordon's testimony that Yablonsky told him about such a paper. Obviously, no other person, either his wife or a visitor, could testify to what Yablonsky told Gordon on the telephone. Thus, we have solely the credibility of agent Yablonsky and the credibility of Gordon upon which the trial court could base his determination as to the truth of the essential fact touching on the voluntariness of Yablonsky's original entry into the apartment. The trial court credited the agent. And, in light of all of the evidence produced in connection with the motion to suppress, well he might. We conclude that there was ample evidence upon which the trial court could find that Yablonsky was legally present in Gordon's apartment at the time when he observed the two cups.

Upon returning to his office Yablonsky examined photographs of items allegedly stolen within the last year from John F. Kennedy Airport in New York. He thereupon prepared an affidavit for a search warrant in which he described the shipment of 187 pieces of "Greek jewelry" stolen from the airport, stating that each piece was marked with either 18K or 22K, plus trademark Z or Zolotas. He described the cups as appearing to be purple in color and stated that, upon reviewing photographs he "believed" the cups identical to the cups "stolen."[1]

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[1]The affidavit upon which the warrant was issued was as follows:

"The undersigned, being duly sworn deposes and says: That he has reason to believe that on the premises known as The Kennedy House, Apartment 2-A, 1865 79th Street Causeway, North Bay Village, Dade County, Florida, in the Southern District of Florida, there is now being concealed certain property, or a portion thereof, which was contained in a light-colored quarter-inch plywood container, 15"x15"x10", weighing approximately 47½ pounds, bearing the names of "Tresor" S. Papastanos and Company, Athens, Greece, and Elias Lalaounis, c/o Greek Fashions, Inc., 15 East 46th Street, New York, New York. The box contained 187 pieces of 17-carat and 22-carat gold men's and women's jewelry, consisting of rings, crosses, cups, earrings, cuff links, bracelets, and necklaces, some of which contain diamonds, rubies, pearls, emeralds and/or sapphires. Each piece is marked with either 18K or 22K plus trademark "Z" or Zolotas, which was stolen at the John F. Kennedy Airport, New York, New York, between January 12 and January 15, 1968, while moving in foreign commerce between "Tresor" S. Papastanou and Company, Athens, Greece, and Eias Lalaounis, c/o Greek Fashions, Inc., 15 East 46th Street, New York, New York, and valued at approximately $37,000 in violation of Title 18, Section 659, United States Code.

And that the facts tending to establish the foregoing grounds for issuance of a search warrant are as follows: On March 14, 1968, between the approximate hours of 10:00 a. m. and 12:30 p.m., while on official business I had the occasion to interview Herman Gordon, who resides at Apartment 2-H, 1865 79th Street Causeway, North Bay Village, Florida, concerning air travel to the Dominican Republic from Miami, Florida, on

Based on this affidavit, the magistrate issued a search warrant in which he recited the statement made in the affidavit, and then said: "As I am satisfied that there is probable cause to believe that the property so described is being concealed on the premises above described, and that the foregoing grounds for application for issuance of the search warrant exist; you are hereby commanded to search forthwith, etc."

The first attack made by the appellant is that the search warrant was based on a conclusionary statement rather than on a statement of facts. We find no substance in this contention whatever. The fact that the agent said that he "believed" that the cups he saw in Gordon's apartment were the identical cups of which he had seen a picture would be no more a conclusion than if the agent had actually seen the cups themselves and then swore that he

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February 25, 1968 and a return passage on February 26, 1968. During the course of this interview I observed on the top of an end table adjacent to a telephone in the living room of the apartment, a small cup which appeared to be purple in color on a gold filigree stand approximately three and a half to four inches in height, and in a French Provincial breakfront located on the north wall of the living room, I observed a similar type cup. These cups appeared familiar to me at this time and later, when I had left the apartment, I recalled that another agent of the Miami office of the F.B.I. had shown to me several photographs of jewelry consisting of crosses, bracelets, cups, rings, and other items which had been stolen from foreign commerce at the John F. Kennedy Airport, New York, New York, in January, 1968. I again reviewed these photographs and believe the cups I observed in Apartment 2-H, Kennedy House, North Bay Village, Florida, on March 14, 1968, are identical to the cups which were stolen at John F. Kennedy Airport, New York, New York, on January 12-15, 1968.

/s/ JOSEPH YABLONSKY
Special Agent
Federal Bureau of Investigation

believed the cups he saw in the Gordon apartment were the same cups. He could never identify them beyond what he actually "believed." His belief was based on observation and was adequate to establish reasonable cause. As stated in *United States v. Saka*, 3 Cir., 1964, 339 F.2d 541, "If an officer sees the fruits of a crime, *or what he has good reason to believe to be the fruits of a crime*, freely lying upon a suspect's property, the officer is not required to look the other way or to disregard the evidence, merely because he is not armed with a search warrant." (Emphasis added.) We find nothing in *Giordenello v. United States*, 357 U.S. 480, that requires a different conclusion here. The court was there concerned with the fact that the affidavit of the officer did not indicate any source for his belief, and that it did not set forth any sufficient basis upon which a finding of probable cause could be made by the magistrate. Here, the affidavit gave ample cause upon which the magistrate could base his determination of the existence of probable cause.

We next turn to the basic attack upon the search warrant on the theory that the information upon which it was obtained was learned by the FBI agent by gaining entrance to Gordon's apartment by a ruse. We agree with the trial court that, although much of the jewelry which was the subject of proof during the trial was discovered after a later search warrant was issued, its seizure for evidentiary purposes must be justified, if at all, upon the search warrant which we have heretofore discussed.

The trial court found that entrance was gained legally by agent Yablonsky. Appellant contends that what Yablonsky saw while present in Gordon's apartment for two hours or more could not be used as the basis for obtaining

a search warrant, because in effect the mere observation of these items amounted in itself to an illegal search. As to this proposition, our court has said: "A search implies an examination of one's premises or person with a view to the discovery of contraband or evidence of guilt to be used in the prosecution of a criminal action. The term implies exploratory investigation or quest." *Haerr v. United States*, 5 Cir., 1957, 240 F.2d 533, 535, and in *Agius v. United States*, 5 Cir., 1969, 413 F.2d 915, this court stated: "The finding below that appellant voluntarily went to the car and exposed its contents and that the agents observed the gun is adequately supported by testimony. It is clear that items in plain view of law enforcement officers are not discovered as a result of a search." See also *United States v. Saka*, supra, and *Ker v. California*, 374 U.S. 23, 1963.

Upon executing a search warrant, special agent Yablonsky and four other agents waited approximately 25 minutes for the arrival of defendant's attorney, and because Mr. Gordon was not present personally, they waited at the request of his wife for this period of time. After this delay they seized the two cups, but then went ahead with the search before Gordon returned at approximately two p.m. At this time defendant requested the agents leave without examining the contents of a locked closet. In light of the fact that the warrant referred to a shipment containing 187 pieces, the agents continued the search and caused the closet to be opened, which revealed suitcases piled one on top of another, and items of jewelry lying on the floor. After a cursory examination of the contents of the suitcases, agent Yablonsky decided to obtain a second search warrant, which he did. Others went out to obtain packing material for the items found in the closet, while others remained in the apartment.

After the second warrant was executed and a partial inventory was prepared of the contents of the suitcases, listing 22 pieces of jewelry as being part of the shipment of 187 pieces described in the original warrant, the inventory was not completed until a later date in accordance with agreement between defendant's attorney and the agents, on account of the lateness of the hour, and the large quantity of jewelry to be inventoried. Nevertheless, the jewelry was all seized. The appellant was not arrested at any time during the day. Subsequently an indictment was returned charging him in four counts; count one charged defendant with possession of the pieces that were actually a part of the 187- piece shipment allegedly stolen from John F. Kennedy Airport; counts two, three and four charged the defendant with possession or receiving stolen jewelry while moving in foreign commerce, all of which items were discovered by the search, but were not part of the shipment mentioned in the search warrant.

Appellant's motion to suppress is further based on the contention that on the search warrant relating the 187-piece shipment, it was improper for the search to continue until the other items, which were the subject of his convictions, were later discovered. The simple answer to this is that the great mass of jewelry found hidden in Gordon's apartment behind a locked door under circumstances which included the fact that Gordon was not in the jewelry business and had already been apparently found in possession of the identifiable stolen articles from the 187-piece shipment warranted the seizure by the agents of the remaining jewelry pending investigation as to their source. This issue becomes significant because, for failure of the attendance by an important witness to support the charges under the first count of the indictment, dealing

with the Kennedy Airport theft, the trial court dismissed this count of the indictment, leaving pending the three counts which dealt with the other jewelry.

The evidence at the trial was fully sufficient to warrant the jury's finding that all of the jewelry mentioned in the remaining three counts was stolen and in transit, and we conclude that the trial court did not incorrectly charge the jury that Gordon's possession of "recently stolen" jewelry permitted the inference of knowledge on his part. We conclude that in light of the nature of the articles, and the inherent difficulties in disposing of stolen property of this character, including a large number of new watch movements, the term "recently stolen" is a relative term. We find that it was not error for the trial court to use it in its charge to the jury under these circumstances.

Appellant contends that there was no evidence to support the conviction on Count 4, in that the two rings mentioned in that count were merely gold mountings worth only several hundred dollars or less. At the time they were stolen they had diamonds in them, and the proof showed they were worth in excess of $5,000 (the value required to be shown to bring the case within federal jurisdiction). While the government contends that property "received, concealed [or] stored" by a person other than the owner under circumstances otherwise showing illegal possession "must be evaluated at the time and place where it was stolen," *Tippett v. United States*, 4 Cir., 1965, 353 F.2d 335, we think that principle does not apply here. The record here contains specific testimony of a third party that Gordon acquired these two mountings without the diamonds approximately a week before he was arrested. This destroys

any inference that might otherwise be drawn by the jury that the rings were at some time "received," "concealed," or "stored" in the same condition as when they were stolen.

We conclude, therefore, that the conviction on Count 4 cannot stand. However, since the other concurrent valid sentences were imposed the total time to be served is not affected. See *Benton v. Maryland*, 1969, 395 U.S. 784, 89 S. Ct. ____, 23 L.Ed. 2d 707; *White v. United States*, 5 Cir., 1969, ____ F.2d ____, No. 25147, November 24, 1969.

We have carefully considered each ground of the appeal, whether fully discussed here or not, and find that they are without merit. We conclude that the legality of agent Yablonsky's presence in Gordon's apartment when he observed the cups was an issue of credibility and the resolution of this issue by the trial court cannot be held to be clearly erroneous. It follows from that that Yablonsky's affidavit upon which the search warrant was issued was fully adequate, and the search pursuant thereto did not exceed the requirements established with respect to searches under the Fourth Amendment limitations. We further conclude that the trial court did not err in charging the principle of possession of recently stolen property, but that error resulted from the admission in evidence of the testimony concerning the value of the rings shipped from Rich's store in Atlanta at the time they were stolen, as distinguished from the condition of the rings at the time they were found as a result of the search.

The judgment is AFFIRMED as to the first three counts, and REVERSED as to Count 4.

APPENDIX "B"

UNITED STATES COURT OF APPEALS
For The Fifth Circuit

October Term, 1969

No. 27455

D. C. Docket No. 63-355-Cr.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

HERMAN GORDON,
Defendant-Appellant,

Appeal from the United States District Court for the Southern District of Florida.

Before BROWN, Chief Judge, TUTTLE and MORGAN, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF. It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed as to the first three counts and reversed as to Court 4, in accordance with the opinion of this Court.

It is further ordered that defendant-appellant pay to plaintiff-appellee, the costs on appeal to be taxed by the Clerk of this Court.

January 26, 1970

Issues as Mandate:

APPENDIX "C"

In The
UNITED STATES COURT OF APPEALS
For The Fifth Circuit

No. 27455

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

HERMAN GORDON,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Florida

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(February 18, 1970)

ON PETITION FOR REHEARING

Before BROWN, Chief Judge, TUTTLE and MORGAN, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

APPENDIX "D"

In The
UNITED STATES COURT OF APPEALS
For The Fifth Circuit

No. 27455

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

HERMAN GORDON,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Florida

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ORDER

(February 19, 1970)

Before BROWN, Chief Judge, TUTTLE and MORGAN, Circuit Judges.

BY THE COURT:

IT IS ORDERED that the motion of appellant for a stay of the order of the District Court revoking the appeal bond in the above entitled and numbered cause be and the same is hereby GRANTED to and including March 21, 1970.

APPENDIX "E"

In The
UNITED STATES DISTRICT COURT
For The Southern District of Florida

Case No. 68-139

Commissioner's Docket No. 5
UNITED STATES OF AMERICA,

v.

PREMISES KNOWN AS THE KENNEDY HOUSE, APARTMENT 2-H, 1865 79TH STREET CAUSEWAY, NORTH BAY VILLAGE, DADE COUNTY, FLORIDA.

SEARCH WARRANT

TO: Special Agent John R. Ackerly, Federal Bureau of Investigation, Miami, Florida; or
Any Other Special Agent of the Federal Bureau of Investigation.

Affidavit has been made before me by Special Agent Joseph Yablonsky, of the Federal Bureau of Investigation, Miami, Florida, that he has reason to believe that on the premises known as The Kennedy House, Apartment 2-H, 1865 79th Street Causeway, North Bay Village, Dade County, Florida, in the Southern District of Florida, there is now being concealed certain property, or a portion thereof, which was contained in a light-colored quarter inch plywood container, 15" x 15" x 10", weighing approximately 47-½ pounds, bearing names of "Tresor" S. Papastanou and Company, Athens, Greece, and Elias Lalaounis, c/o Greek Fashions, Inc., 15 East 48th Street, New York,

New York. The box contained 187 pieces of 18-carat and 22-carat gold men's and women's jewelry consisting of rings, crosses, cups, ear rings, cuff links, bracelets, and necklaces, some of which contain diamonds, rubies, pearls, emeralds and/or sapphires. Each piece is marked with either 18K or 22K plus trademark "Z" or Zolotas, which was stolen at the John F. Kennedy Airport, New York, New York, between January 12 and January 15, 1968 while moving in foreign commerce between "Tresor" S. Papastanou and Company, Athens, Greece, and Elias Lalaounis, c/o Greek Fashions, Inc., 15 East 48th Street, New York, New York, and valued at approximately $37,000 in violation of Title 18, Section 659, United States Code.

As I am satisfied that there is probable cause to believe that the property so described is being concealed on the premises above-described and that the foregoing grounds for application for issuance of the search warrant exists;

You are hereby commanded to search forthwith the place named for the property specified serving this Warrant and making the search in the daytime and if the property be found there to seize it, leaving a copy of this Warrant and a receipt for the property taken, and prepare a written inventory of the property seized and return this Warrant and bring the property before me within ten days of this date as required by law.

Dated this 15th day of March, 1968.

/s/ Edward P. Swan

EDWARD P. SWAN
United States Commissioner

App. 23

RETURN

I received the attached search warrant 15th March 1968 and have executed it as follows:

On 18th of March 1968 at 12:13 o'clock PM, I searched the premises described in the warrant and I left a copy of the warrant with Herman Gordon together with a receipt for the items seized. The following is an inventory of property taken pursuant to the warrant:

One gold cup, blue enamel, green interior
One gold cup, blue enamel, gold interior

This inventory was made in the presence of Herman Gordon and I swear that this inventory is a true and detailed account of all the property taken by me on the warrant.

/s/ John R. Ackerly

SA John R. Ackerly F.B.I.

Subscribed and sworn to and returned before me this 19th day of March 1968.

/s/ Edward P. Swan

U. S. Commissioner

APPENDIX "F"

"The evidence in the case need not establish that the accused actually knew the watch movements mentioned in the indictment constituted a part of foreign shipment. It is sufficient if the Government proves beyond a reasonable doubt that the defendant at the time of his alleged possession knew these items had been stolen or unlawfully taken or carried away. The Government, of course, in order to establish the other essential element of the offense must prove beyond a reasonable doubt that the watch movements were a part of or did constitute foreign shipment, and that the watch movements were, in fact, stolen from or unlawfully taken or carried away from the airport described in count two; and that the defendant did unlawfully, wilfully and knowingly have in his possession the said watch movements." (A. 502).

* * *

"Possession of property recently stolen, if not satisfactorily explained is ordinarily a circumstance from which the jury may reasonably draw the inference and find, although it need not do so, in light of the surrounding circumstances shown by the evidence in the case that the person in possession knew that the property had been stolen.

"The term 'recently' is a relative term and has no fixed meaning.

"Whether property may be considered as recently stolen depends on the nature of the property and all of the facts and circumstances shown by the evidence in the case. The longer the period of time since the theft, the

more doubtful becomes the inference which may reasonably be drawn from unexplained possession.

"In considering whether possession of recently stolen property has been satisfactorily explained, the jury is reminded that in the exercise of constitutional rights, the accused did not take the witness stand and testify.

"Possession may be satisfactorily explained by facts and circumstances in evidence, independent of any testimony or other evidence from the accused.

"The jury will also bear in mind that the law never imposes upon the defendant in a criminal case the burden or the duty of calling any witness or producing any evidence.

"It is the exclusive province of the jury to determine whether the facts and circumstances shown by the evidence in the case warrant any inference which the law permits the jury to draw from possession of recently stolen property. If any possession the accused may have had of recently stolen property is consistent with innocence, the jury should acquit the accused." (A. 503-4)